

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 41880-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DAVANTE LEACH, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by denying Defense's motion to withdraw as counsel.
2. The trial court deprived Leach of his right to counsel when it refused to allow Leach to discharge his privately retained counsel prior to sentencing and be appointed new counsel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Court erred by denying Defense's motion to withdraw where Leach had discharged his private counsel when counsel refused to bring a motion to withdraw plea, Leach had a right to discharge his private counsel, and Leach had a right to representation during all critical phases of his case.

III. STATEMENT OF THE CASE

On November 9, 2010, Davante Leach pled guilty to one count of assault in the first degree with a firearm enhancement and one count of unlawful possession of a firearm in the first degree. 11/9/10 RP 3, CP 6-14. Leach was advised that his sentencing range for the assault charge

was 162 months to 216 months, plus 60 months for the enhancement. CP 7. However, he was not told in the paperwork or the court's colloquy that the enhancement time was flat time not subject to good time credit. See CP 6-14, 11/9/10 RP. He was also incorrectly advised that this offense was his only strike, when it was actually his second strike. 11/9/10 RP 9-10, 2/11 RP 8-9.

On February 11, 2011, when the parties appeared for sentencing, defense counsel brought a motion on Leach's behalf to permit him to withdraw as counsel.¹ CP 15-16, 2/11 RP. Counsel advised the court that Leach wished to discharge his privately retained counsel and take advantage of the court's prior order finding him indigent, to have counsel appointed to bring a motion to withdraw guilty plea. 2/11 RP 3-7.

Defense counsel stated that he had told Leach he would not bring a motion to withdraw plea on his behalf. 2/11 RP 5. Defense counsel communicated to the court that Leach had not understood that his firearm enhancement was flat time and disagreed with the offender score calculation. 2/11 RP 6-7. The prosecutor conceded that Leach had been erroneously advised at the time of the plea that this was his first strike offense. 2/11 RP 8-9.

¹ Leach had waived his right to speedy sentencing. 11/9/10 RP 12-13. This motion had been filed January 6, 2011. CP 15.

Leach told the court he felt his attorney had not told him the truth or communicated with him and that he wanted to discharge his counsel and have new counsel bring a motion to withdraw plea. 2/11 RP 9-10.

The court denied Leach's motion to substitute counsel and set sentencing for February 25. 2/11 RP 11.

On February 25, 2011, Leach renewed his motion for new counsel so that he could bring a motion to withdraw his guilty plea, but the motion was again denied. 2/25 RP 13-14. Leach was sentenced to the high end of the standard range, with the 60 month enhancement. 2/25 RP 28.

After the court announced the sentence, the parties realized Leach had several family members who had wished to speak on his behalf. 2/25 RP 30-31. The judge stated that she would reconsider and permitted Leach's Father, Mother, and Aunt to speak. 2/25 RP 31. Following the statements, the judge confirmed the same sentence. 2/25 RP 42. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE COURT ERRED BY DENYING DEFENSE’S MOTION TO WITHDRAW BECAUSE LEACH HAD DISCHARGED HIS PRIVATE COUNSEL WHEN COUNSEL REFUSED TO BRING A MOTION TO WITHDRAW PLEA, LEACH HAD A RIGHT TO DISCHARGE HIS PRIVATE COUNSEL, AND LEACH HAD A RIGHT TO REPRESENTATION DURING ALL CRITICAL PHASES OF HIS CASE.

Leach was deprived of his constitutional right to counsel when his motion to discharge counsel and for new counsel was denied. Leach’s retained counsel refused to bring a motion to withdraw guilty plea on his behalf and then the court refused to permit Leach to discharge his retained counsel and have new counsel appointed to permit him to bring this motion and to represent him at sentencing. Therefore, Leach was forced to proceed to sentencing with private counsel he wanted to discharge and was deprived of counsel to bring a motion to withdraw his guilty plea. The trial court abused its discretion in denying his motion to withdraw and substitute counsel.

Under the Sixth Amendment, a defendant has a constitutional right to counsel at all “critical stages” of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). The Sixth Amendment right to counsel generally includes the right to select and be represented by counsel of the defendant’s choice. *State v. Price*, 126 Wn. App. 617, 631, 109 P.3d 27 (2005) (*quoting State v. Roth*, 75 Wn. App.

808, 824, 881 P.2d 268 (1994)).

In addition, by court rule, counsel must be provided at every stage of the proceedings, including at sentencing, on appeal, and in postconviction review. CrR 3.1(b)(2); *Robinson*, 153 Wn.2d at 692. A motion to withdraw guilty plea under CrR 4.2(f), which is brought before judgment is entered, is a “critical stage” requiring representation of counsel under the constitution and court rule.² *State v. Davis*, 125 Wn. App. 59, 64, 104 P.3d 11 (2004); *see also Robinson*, 153 Wn.2d at 698 n. 7 (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)).

The court rules place limitations on when counsel may withdraw. CrR 3.1(b)(2) provides in relevant part:

A lawyer initially appointed shall continue to represent the defendant through all stages of the proceedings unless a new appointment is made by the court following withdrawal of the original lawyer pursuant to section (e) because geographical considerations or other factors make it necessary.

CrR 3.1(e) provides that: “Whenever a criminal cause has been set for trial, no lawyer shall be allowed to withdraw from said cause, except upon written consent of the court, for good and sufficient reason shown.”

In reviewing the trial court’s denial of a motion to withdraw and

² A defendant may move, orally or in writing, to withdraw a guilty plea prior to judgment. CrR 4.2(f); *State v. Davis*, 125 Wn. App. 59, 63-64, 68, 104 P.3d 11 (2004). *Cf.* CrR 4.2 (CrR 4.2 does not set specific procedures for making the motion to withdraw a plea).

substitute appointed counsel, the appellate court is to consider: “(1) the extent of the conflict, (2) the adequacy of the [trial court's] inquiry, and (3) the timeliness of the motion.” *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006) (*quoting Pers. Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1 (2001)). The standard of review is abuse of discretion. *State v. Bird*, 31 Wn.2d 777, 783, 198 P.2d 978 (1948).

In this case, Leach’s counsel filed a motion to withdraw on January 6, 2011, well in advance of sentencing. CP 15. He filed the motion after Leach told him he was discharged as his counsel and wished to have appointed counsel. 2/11 RP 4-5. On February 11, 2011, defense counsel advised the court that Leach wished to discharge him and take advantage of the court’s prior order finding him indigent, to have counsel appointed to bring a motion to withdraw guilty plea and represent him at sentencing. 2/11 RP 3-7. Defense counsel had refused to bring a motion to withdraw plea on Leach’s behalf. 2/11 RP 5. Defense counsel communicated to the court that Leach had not understood that his firearm enhancement was flat time and disputed the offender score calculation. 2/11 RP 6-7. The prosecutor conceded that Leach had also been erroneously advised at the time of the plea that this was his first strike offense. 2/11 RP 8-9. Leach told the court he felt his attorney had not told him the truth or communicated with him and that he wanted to discharge his private

counsel and have new counsel bring a motion to withdraw plea. 2/11 RP 9-10. The court denied Leach's motion to substitute counsel and set sentencing for February 25. 2/11 RP 11.

Leach was entitled under the 6th Amendment to have counsel represent him in bringing a motion to withdraw guilty plea. *State v. Davis*, 125 Wn. App. 59, 64, 104 P.3d 11 (2004). He had already been found indigent and was therefore eligible for appointed counsel. 2/11 RP 6-7. Leach was therefore entitled to discharge private counsel, who had refused to bring a motion to withdraw on his behalf, and proceed with counsel who would actually represent him. There is no evidence in the record that permitting appointed counsel to substitute in for sentencing and a motion to withdraw would have compromised the State's case in any way. As it was, the court did not proceed to sentencing at the February 11 hearing, but rather set it over to February 25. Therefore, the court abused its discretion when it denied Leach's motion and the denial compromised Leach's 6th Amendment right to counsel by preventing him from being represented in bringing a motion to withdraw and by exercising his right to discharge private counsel.

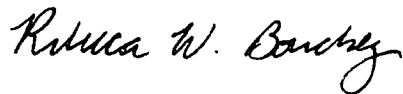
Because Leach was deprived of his right to counsel at a critical stage of the proceedings, this case should be remanded for the

appointment of new counsel to bring Leach's motion to withdraw guilty plea.

V. CONCLUSION

For the reasons stated above, the trial court erred in denying Leach's motion for new counsel and thereby denied Leach of his 6th Amendment right to counsel. Therefore, the case should be remanded to the trial court for the appointment of new counsel to bring a motion to withdraw guilty plea on Leach's behalf.

DATED: August 9, 2011



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CERTIFICATE OF SERVICE

I certify that on August 9, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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